

In the United States  
**Circuit Court of Appeals**  
for the Ninth Circuit 15

---

JAMES W. MALONEY, Collector of Internal Revenue  
of the United States for the District  
of Oregon, APPELLANT

v.

WESTERN COOPERAGE COMPANY, a corporation,  
APPELLEE

---

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF OREGON

---

**BRIEF FOR THE APPELLANT**

---

JAMES W. MORRIS,  
*Assistant Attorney General*

SEWALL KEY,

JAMES P. GARLAND,  
*Special Assistants to the  
Attorney General*

CARL C. DONAUGH,  
*United States Attorney.*

FILED

DEC 22 1938

PAUL B. O'BRIEN



# INDEX

	Page
Opinion below .....	1
Jurisdiction .....	1
Question presented .....	2
Statute and other authority involved.....	2
Statement .....	4
Specification of errors to be urged.....	7
Summary of Argument .....	7
Argument:	
The resolution did not constitute a declaration of dividends such as is contemplated by Section 213 of the National Industrial Recovery Act .....	8
Conclusion .....	13

## CITATIONS

Cases:	Pages
<i>Alabama Pipe Co. v. United States</i> , 21 F. Supp. 173.....	11
<i>Alexander &amp; Alexander, Inc. v. United States</i> , 22 F. Supp. 921.....	11
<i>Carney v. Crocker</i> , 94 F. (2d) 914.....	10, 12
<i>Evening Star Newspaper Co. v. United States</i> , 16 F. Supp. 1020.....	11
<i>Greenwood Compress &amp; Storage Co. v. Fly</i> , decided August 10, 1938	12
<i>Lockhart Iron &amp; Steel Co. v. O'Toole</i> , 22 F. Supp. 919.....	11
<i>Smith v. Moore</i> , 199 Fed. 689.....	10
<i>Spencer v. Lowe</i> , 198 Fed. 961.....	10
<i>United States v. Murine Co.</i> , 90 F. (2d) 549, certiorari denied, 302 U. S. 734 .....	10, 12
<i>United States v. Southwestern Portland Cement Co.</i> , 97 F. (2d) 413 .....	11, 12
<i>United States v. Southwestern R. Co.</i> , 92 F. (2d) 897.....	12
Statute:	
National Industrial Recovery Act, c. 90, 48 Stat. 195, Sec. 213.....	2, 8
Miscellaneous:	
I.T. 2744, XII-2 Cumulative Bulletin 402.....	3, 9



In the United States  
**Circuit Court of Appeals**  
for the Ninth Circuit

---

**No.** 9032

---

JAMES W. MALONEY, Collector of Internal Revenue  
of the United States for the District  
of Oregon, APPELLANT

*v.*

WESTERN COOPERAGE COMPANY, a corporation,  
APPELLEE

---

*ON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF OREGON*

---

**BRIEF FOR THE APPELLANT**

---

**OPINION BELOW**

The findings of fact and conclusions of law (R. 35-44) are not reported.

**JURISDICTION**

This appeal involves a claim for refund of Federal excise taxes paid on the receipt of dividends dur-

ing the period from June 16, 1933, to December 31, 1933. Judgment was rendered in favor of appellee on July 5, 1938, for the sum of \$6,449.72 with interest, from which decision defendant below appealed on October 4, 1938. (R. 45-47.)

The jurisdiction of this Court is invoked by virtue of the provisions of Section 128 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTION PRESENTED

Whether a resolution adopted by the board of directors of taxpayer corporation constituted an enforceable declaration of dividends as of a date prior to the enactment of the taxing statute.

#### STATUTE AND OTHER AUTHORITY INVOLVED

National Industrial Recovery Act, c. 90, 48 Stat. 195:

SEC. 213. (a) There is hereby imposed upon the receipt of dividends (required to be included in the gross income of the recipient under the provisions of the Revenue Act of 1932) by any person other than a domestic corporation, an excise tax equal to 5 per centum of the amount thereof, such tax to be deducted and withheld from such dividends by the payor corporation. The tax imposed by this section shall not apply to dividends declared before the date of the enactment of this Act.

(b) Every corporation required to deduct

and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the collector of the district in which its principal place of business is located, or, if it has no principal place of business in the United States, to the collector at Baltimore, Maryland.

(c) Every such corporation is hereby made liable for such tax and is hereby indemnified against the claims and demands of any person for the amount of any payment made in accordance with the provisions of this section.

\* \* \* \*

I.T. 2744, XII-2 Cumulative Bulletin 402:

\* \* \* \*

Following the established rule of construction, the expression "dividends declared" as used in the statute is to be construed and applied according to its accepted legal meaning. Stated briefly, the declaration of a dividend by the board of directors of a corporation has the legal effect of creating the relationship of debtor and creditor between the corporation and the stockholder, and the rights of the stockholder as such creditor become immediately vested regardless of the fact that the dividend may be payable at some future time. In order for a dividend to be

fully "declared" within the meaning of the statute the action taken by the board of directors must be such as to create the relationship of debtor and creditor between the corporation and the stockholder, and the debt so created must be a legal and enforceable debt which is definite, final, and irrevocable. A dividend so declared of course effects an appropriation of surplus to the payment of the debt thereby created.

\* \* \* \*

#### STATEMENT

This is an action brought in the District Court of the United States for the District of Oregon, against the Collector of Internal Revenue, for the recovery of Federal excise taxes assessed and collected under Section 213 of the National Industrial Recovery Act. The case was tried before the court sitting without jury, jury having been waived by stipulation. (R. 12-13.) The facts were stipulated. (R. 13-21.) The District Court made special findings of fact and conclusions of law (R. 35-44), and gave judgment for taxpayer in the sum of \$6,449.72, together with interest from December 28, 1935, from which judgment Collector has appealed to this Court (R. 45-47).

The court below found the facts as stipulated. The findings may be summarized as follows:

Plaintiff below, hereinafter referred to as taxpayer, is a corporation organized under the laws of



the State of Oregon with its principal place of business in the City of Portland. (R. 36.) On or about January 16, 1933, taxpayer's board of directors at their annual meeting adopted and passed a resolution as follows (R. 37):

RESOLVED, that the Secretary and Treasurer of this Company be and he is hereby authorized, empowered and directed to pay monthly dividends of  $\frac{1}{2}$  of 1% each month for the year 1933 whenever in his judgment there are moneys available to pay the same and further that whenever in the judgment of said Secretary and Treasurer there are moneys available to increase the amount of said dividends for any month or months thereof, said Secretary and Treasurer is hereby authorized, empowered and directed to pay such additional dividends.

Taxpayer paid dividends to the holders of its common stock subsequent to June 16, 1933, and prior to December 31, 1933, as follows (R. 37-38):

Paid in month of 1933	Total dividend paid	Par value stock on which dividend paid	Per cent of dividend paid
June .....	\$ 14,883.00	\$2,976,600.00	0.5%
July .....	14,883.00	2,976,600.00	0.5%
August ....	14,883.00	2,976,600.00	0.5%
September..	14,883.00	2,976,600.00	0.5%
October ....	14,883.00	2,976,600.00	0.5%
November	14,883.00	2,976,600.00	0.5%
December..	29,766.00	2,976,600.00	1.0%
	<hr/>		
	\$119,064.00		4.0%

An excise tax of 5 per cent of the dividends, aggregating \$119,064, was assessed, with interest to December 30, 1935, and paid by the taxpayer on December 28, 1935. (R. 38, 39.)

A claim for refund in the amount of \$6,449.72 was filed February 21, 1936 (R. 40), and disallowed May 22, 1936 (R. 41). The taxes and interest paid amounted to \$7,348.77. (R. 40.) The difference between the amount claimed and the amount paid represents the tax on one-half the dividends paid in December, 1933, being the dividends referred to in the last portion of the resolution of January 16, 1933. (R. 40, 41.)

The court below likewise found that (R. 42-43):

During the year 1933 plaintiff's earned surplus, available for dividends payable thereafter, as of the last day of certain months, was as shown in the following table:

As of the last day of 1933	Earned Surplus
May .....	\$ 724,125.81
June .....	707,366.81
July .....	692,390.01
August .....	677,507.01
September .....	660,841.81
October .....	645,958.81
November .....	631,075.81
December .....	546,515.12

At all times during the year 1933 plaintiff had earnings and profits accumulated subsequent to

February 28, 1913, in excess of \$300,000.00. At all times during the year 1933, there was money available in plaintiff's treasury to pay dividends on its common stock in amounts not less than one-half of one per cent per month on all outstanding common stock.

The court below concluded that the resolution of January 16, 1933, created a debtor and creditor relationship by and between taxpayer and its stockholders for the payment of the dividends taxed. (R. 43-44.)

#### SPECIFICATION OF ERRORS TO BE URGED

1. The court erred in rendering and entering its decision and judgment in favor of appellee and against appellant for the reason that the judgment is contrary to the law and is not supported by the facts as found by the court.

2. The court erred as a matter of law in concluding that the resolution of January 16, 1933, created a debtor and creditor relationship between the taxpayer and its stockholders for the payment of dividends of  $\frac{1}{2}$  of 1 per cent each month for the year 1933.

#### SUMMARY OF ARGUMENT

The resolution of January 16, 1933, did not constitute a declaration of dividends within the intentment of Section 213 of the National Industrial Recovery Act for the reason that the resolution did not cre-

ate a debt of the corporation in favor of the stockholders. The payment of the dividends taxed was left entirely to the discretion of the secretary and treasurer of the company. The resolution of January 16, 1933, merely permitted payment of the dividends and was not an irrevocable declaration as required by the clear intent of the statute.

#### ARGUMENT

#### THE RESOLUTION DID NOT CONSTITUTE A DECLARATION OF DIVIDENDS SUCH AS IS CONTEMPLATED BY SECTION 213 OF THE NATIONAL INDUSTRIAL RECOVERY ACT.

The National Industrial Recovery Act was approved and became effective June 16, 1933. Section 213 (a) thereof provides for an excise tax of 5 per cent upon the receipt of dividends by any person other than a domestic corporation. This section likewise provides that the "tax imposed by this section shall not apply to dividends declared before the date of the enactment of this Act."

The dividends taxed were paid after June 16, 1933, and prior to December 31, 1933, and are clearly taxable unless the resolution of January 16, 1933, is a declaration of dividends within the meaning of the exempting portion of the Act.

The Bureau of Internal Revenue has ruled, I.T. 2744, XII-2 Cumulative Bulletin 402, that (p. 403):

In order for a dividend to be fully "declared" within the meaning of the statute the action taken by the board of directors must be such as to create the relationship of debtor and creditor between the corporation and the stockholder, and the debt so created must be a legal and enforceable debt which is definite, final, and irrevocable. A dividend so declared of course effects an appropriation of surplus to the payment of the debt thereby created.

The court below found that the resolution of January 16, 1933, created an enforceable debt in favor of the shareholders and against the corporation. The wording of the resolution does not support this conclusion. The resolution contains the following (R. 37):

RESOLVED, that the Secretary and Treasurer of this Company be and he is hereby authorized, empowered and directed to pay monthly dividends of  $1\frac{1}{2}$  of 1% each month for the year 1933 *whenever in his judgment there are moneys available to pay the same \* \* \**. (Italics supplied.)

The italicized words above constitute an expressed reservation. The question of the availability of funds is left to the sole judgment and discretion of the secretary and treasurer. It is not enough that the books reflect earned surplus. The designated officer of the corporation is empowered to determine whether any

portion of the surplus is "available" for dividend payments. If he decided that the earned surplus should be retained or used for purposes other than the payment of dividends, the stockholders could not be heard to complain. Should the stockholders bring suit against the corporation to enforce the payment of the dividends, the corporation could successfully defend by pointing to the reservation contained in the resolution.

The dividends in this case constituted merely a division of profits among the stockholders equivalent to a constructive dividend declared as of the date of payment. *Smith v. Moore*, 199 Fed. 689 (C.C.A. 9th); *Spencer v. Lowe*, 198 Fed. 961 (C.C.A. 8th).

In *United States v. Murine Co.*, 90 F. (2d) 549 (C.C.A. 7th), certiorari denied, 302 U.S. 734, the court held that the resolution there relied upon as a declaration of dividends did not come within the exempting portion of Section 213, *supra*, for the reason that the resolution contained a qualifying clause negating any debtor and creditor relationship. The resolution in that case contained the following (p. 559):

\* \* \* and that in the event, in his {treasurer} judgment, the condition of the treasury \* \* \* shall not warrant the payment of such dividends, he may omit the same \* \* \*.

In *Carney v. Crocker*, 94 F. (2d) 914 (C.C.A.

1st), the court arrived at the same decision. In that case the resolution relied upon contained the following (p. 915):

\* \* \* subject to the approval of the President and Treasurer and Assistant Treasurers.

This Court in *United States v. Southwestern Portland Cement Co.*, 97 F. (2d) 413, considered the same question and decided that a resolution containing the words "unless otherwise ordered by the Board of Directors" was not a sufficient declaration within the exempting portion of the Act. See also *Alexander & Alexander, Inc. v. United States*, 22 F. Supp. 921 (Md.), and *Lockhart Iron & Steel Co. v. O'Toole*, 22 F. Supp. 919 (W.D.Pa.).

The case of *Evening Star Newspaper Co. v. United States*, 16 F. Supp. 1020 (C.Cls.), is not controlling in the instant case for the reason that there the president was delegated the power to declare dividends. In January, 1933, the president announced that dividends would be paid, which action was approved by the board of directors on May 1, 1933, thus establishing the debtor and creditor relationship between the corporation and its shareholders prior to June 16, 1933, the effective date of the Act.

The United States Court of Claims decided adversely to the Government in *Alabama Pipe Co. v. United States*, 21 F. Supp. 173. The resolution involved in that case more closely resembled the one in

the instant case. However, the resolution was adopted in February, 1932, calling for a dividend in the amount of \$145,974. Prior to June 16, 1933, \$114,856.80 of the dividend had been paid. It was only the small remaining portion of the dividend, paid after the effective date of the Act, which was sought to be taxed. Those circumstances are not present in the instant case and appellee here can not say that it might be estopped from testing the validity of the resolution in a suit by a stockholder where most of the dividend had already been paid to the shareholders.

The case of *United States v. Southwestern R. Co.*, 92 F. (2d) 897 (C.C.A. 5th), is not in point for the reason that that case was concerned with the sole issue as to whether or not the corporation was in receipt of the funds from which the dividends were to be paid. The question of the sufficiency of the resolution was not in issue. Cf. *Greenwood Compress & Storage Co. v. Fly* (S.D.Miss.), decided August 10, 1938, not officially reported but found in 1938 P.H., Vol. 1, par. 5.587.

We submit that no logical distinction can be found between the instant case and the cases of *United States v. Southwestern Portland Cement Co.*, *supra*; *United States v. Murine Co.*, *supra*; and *Carney v. Crocker*, *supra*.



## CONCLUSION

The judgment of the lower court is not correct and should be reversed and judgment should be entered for appellant.

Respectfully submitted,

JAMES W. MORRIS,  
*Assistant Attorney General.*

SEWALL KEY,

JAMES P. GARLAND,  
*Special Assistants to the  
Attorney General.*

CARL C. DONAUGH,  
*United States Attorney.*  
DECEMBER, 1938.

